Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2009-000628-001 DT 11/10/2009

HONORABLE ROBERT C. HOUSER

CLERK OF THE COURT
T. Pavia
Deputy

STATE OF ARIZONA

v.

MICHAEL THOMAS CONNERAN (001)

WEBSTER CRAIG JONES

TRACEY WESTERHAUSEN

MESA CITY COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

The Superior Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

On March 9, 2008, a police helicopter dispatched Officer Martineau of the Mesa Police Department to a residence to investigate an alleged impaired driver. The officer arrived at the residence 4-5 minutes after receiving the dispatch. When the homeowner invited the officer inside, the officer observed Appellant Michael Thomas Conneran pouring what appeared to be an alcoholic beverage into a small 4-inch glass and take a drink. Appellant informed the officer that he had just arrived at the residence. After Appellant exhibited signs of impairment, he was arrested and charged with violating A.R.S. §§ 28-1381(A)(1) (impaired to the slightest degree) and 28-1381(A)(2) (BAC of 0.08 or more within two hours of driving – "DUI per se"). Appellant blood was drawn and his BAC was shown to be 0.097. The matter proceeded to a jury trial that commenced on September 24, 2008. After the State rested, Appellant moved for a Rule 20 directed verdict, arguing that the State failed to prove how much alcohol he consumed before or during driving, and that the State failed to show how much alcohol he consumed from the time he exited his vehicle until the time the officer observed him drinking from the glass. The trial

court denied the motion and Appellant presented his case. The trial court gave the jury instructions[1] that included the presumptions found in A.R.S. § 28-1381(G), which states:

> In a trial, action or proceeding for a violation of this section or § 28-1383 other than a trial, action or proceeding involving driving or being in actual physical control of a commercial vehicle, the defendant's alcohol concentration within two hours of the time of driving or being in actual physical control as shown by analysis of the defendant's blood, breath or other bodily substance gives rise to the following presumptions:
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> 1. If there was at that time 0.05 or less alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was not under the influence of intoxicating liquor.
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> 2. If there was at that time in excess of 0.05 but less than 0.08 alcohol concentration in the defendant's blood, breath or other bodily substance, that fact shall not give rise to a presumption that the defendant was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.
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> 3. If there was at that time 0.08 or more alcohol concentration in the defendant's blood, breath or other bodily substance, it ***may*** be presumed that the defendant was under the influence of intoxicating liquor.

[emphasis added]. The jury found Appellant guilty of A.R.S. §28-1381(A)(1) (impaired to the slightest degree), and not guilty of A.R.S. § 28-1381(A)(2) (BAC of 0.08 or more within two hours of driving – "DUI per se"). Appellant filed a Motion for New Trial in which he argued that due to the State's alleged failure to meet its burden of proof, the trial court erred when it failed to grant his Rule 20 judgment of acquittal. The trial court denied Appellant's Motion for New Trial. Appellant filed a timely Notice of Appeal.

The first issue raised by is whether instructing the jury concerning the A.R.S. § 28-1381(G) presumption shifted the burden of proof concerning the A.R.S. §28-1381(A)(1) (impaired to the slightest degree), thereby denying him a fair trial. An objection to jury instructions must be specific and set forth grounds supporting the objection. Ariz.R.Civ.P. 51(a); *Duran v. Safeway Stores, Inc.*, 151 Ariz. 233, 234, 726 P.2d 1102, 1103 (App. 1986). In

[1] Transcript of October 17, 2008 jury instructions (transmitted to this court in a binding separate from the jury trial and sentencing), p. 16, l. 12 to p. 17, l. 4.

reviewing jury instructions, we examine the objection made at trial to determine if reversible error occurred. *See Duran*, 151 Ariz. at 234, 726 P.2d at 1103. Notably, the record transmitted to this court shows that Appellant made no objections to the jury instructions. Failure to raise an issue at trial, including the failure to request a jury instruction, precludes a party from raising that issue on appeal. *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981 (App. 2004). Further, the Arizona Court of Appeals' decision in *State v. Klausner*, 194 Ariz. 169, 978 P.2d 654 (App. 1998) held that because the presumption is permissive and not mandatory, it does not impermissibly shift the burden of proof:

> The Defendant cites three cases, *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *Morrison v. California*, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664 (1934), for the proposition that A.R.S. section 28-692(E) violates due process because it shifts the burden of proof regarding an element of the crime by presuming the existence of the element based on the prosecution's proof of the other elements of the crime. From this general proposition, she reasons that the presumption "violates the Defendant's Due Process rights in that it relieves the [S]tate of the burden of proving that the [D]efendant was impaired by alcohol *at the time of driving*."
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> There are three problems with the Defendant's argument. First, her assertion that the State does not need to prove that she was impaired at the time of driving is simply incorrect. If the State does not prove **657 *172 that, the Defendant will be entitled to an acquittal.
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> Second, presumptions like the ones in issue here have repeatedly been upheld in the face of similar attack. *See State v. Childress*, 78 Ariz. 1, 274 P.2d 333 (1954); *Cacavas v. Bowen*, 168 Ariz. 114, 811 P.2d 366 (App.1991); *State v. Parker*, 136 Ariz. 474, 666 P.2d 1083 (App.1983).
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> Third, the cases the Defendant cites all deal with mandatory presumptions. Here, the statute, in providing that the finder of fact *may* presume that a defendant is under the influence, creates a permissive presumption, and we assume that trial courts routinely instruct the jury to that effect. For an extensive discussion of the difference between mandatory and permissive presumptions see *State v. Spoon*, 137 Ariz. 105, 669 P.2d 83 (1983).

Klausner, supra, at 171-172, 978 P.2d at 656 – 657.

The second issue raised by Appellant is whether the trial court erred when it denied his Motion for New Trial. Motions for new trial are disfavored and should be granted with great caution. *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). *See also State v. Neal*, 143 Ariz. 93, 692 P.2d 272 (1984) (motions for new trial are not looked upon with favor). An appellate court will not reverse a trial court's ruling on a motion for new trial absent a clear abuse of discretion. *State v. Neal*, 143 Ariz. 93, 692 P.2d 272 (1984); *State v. Thornton*, 172 Ariz. 449, 837 P.2d 1184 (App. 1992).

Appellant bases his entire argument on the grounds that the A.R.S. § 28-1381(G) presumption instruction prejudiced him. In his appellate memorandum, Appellant states that he argued this issue in his Motion for New Trail. This is not the case. Appellant merely mentioned the alleged prejudice of the presumption instructions in his facts[2], and in a sentence on the final page.[3] This issue was merely mentioned, not argued. Rather, the Motion for New Trail was solely focused on the whether the State met its burden of proof. Merely mentioning a topic in a sentence in a Motion for New Trial certainly does not qualify as an issue raised and argued for purposes of appeal. Appellant failed to raise this issue at trial and merely mentioned it in his Motion for New Trial. It cannot be raised for the first time on appeal. *State v. Gatliff*, 209 Ariz. 362, 364, 102 P.3d 981, 983 (App. 2004). The record is replete with evidence to support the jury's verdict and the trial court denial of the Motion for New Trial. The trial court did not err in this matter.

Finally, Appellant contends that the trial court erred when it denied his motion for a Rule 20 directed verdict. An appellate court reviews a denial of a motion for judgment of acquittal (directed verdict) for an abuse of discretion. *State v. Hollenback*, 212 Ariz. 12, 126 P.3d 159 (App. 2005). In evaluating a contention that a trial court abused its discretion in denying a defendant's motion for judgment of acquittal, an appellate court views the evidence in a light most favorable to supporting the verdict and will reverse it only if there is a complete absence of substantial evidence to support the conviction. *State v. Sullivan*, 187 Ariz. 599, 931 P.2d 1109 (App. 1996). Appellant contends that the holding in *State v. Gallow*, 185 Ariz. 219, 914 P.2d 1311 (App. 1995) supports his argument that the trial court erred in denying the motion. In *Gallow*, the criminalist testified that she could not state beyond a reasonable doubt whether Gallow had absorbed all the alcohol. Given this testimony, her discussion of all the factors that affect the BAC, and the absence of evidence from which the jury could infer the actual BAC, the Arizona Court of Appeals concluded that the State failed to prove beyond a reasonable doubt that Gallow's BAC was .10 or greater at the time of driving. In the case at bar, however, the State did present some credible evidence from which the jury could have found beyond a reasonable doubt that Appellant was impaired to the slightest degree and that his BAC was in fact 0.08 or greater at the time he was driving:

[2] Defendant's Motion for New Trial, p. 2, ll. 15-17.
[3] *Id*. at p. 7, l. 2.

- A citizen called 9-1-1 and reported an "impaired driver" traveling down the street; this information was relayed to the police helicopter, which monitored Appellant's vehicle until Officer Martineau could respond an investigate.
- The officer observed Appellant's vehicle and that it was parked in front of the residence with his front right tire in the gravel of the front yard.
- The officer observed Appellant pour what appeared to be alcohol into a small glass and take a drink, though the officer did not know how much of it Appellant consumed before he set it down and spoke to the officer.
- Appellant informed the officer that he had just arrived in his vehicle – the same vehicle and plates as reported by the citizen caller to the 9-1-1 operator
- Appellant was slurring his words, had difficulty standing, and emitted an odor of alcohol
- Appellant informed the officer that he had been drinking earlier that day
- The State's criminalist testified that Appellant's BAC was 0.097.

In *State v. Panveno*, 196 Ariz. 332, 996 P.2d 741 (App. 1999), the Arizona Court of Appeals considered similar factors in light of the *Gallow* decision and found that whether a defendant's BAC at the time of driving was 0.10 (now, 0.08) or more is a question for the jury:

> Here, Flaxmayer testified that, at the time defendant was stopped by the police, his BAC could have ranged anywhere from 0.026 to 0.185. Flaxmayer further testified that in his expert opinion, it was impossible to determine where within that range defendant's BAC fell during the time of driving. Thus, Flaxmayer concluded that "it is a realistic possibility" that defendant's BAC was under 0.10 at the time of driving. However, even though Flaxmayer could not offer an expert opinion pinpointing defendant's exact BAC while he was driving, the jury was free to draw its own conclusion. We conclude that defendant presented "some credible evidence" that his BAC was below 0.10 at the time of driving. **Therefore, we must also consider whether the state presented sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant's BAC was in fact 0.10 or greater at the time he was driving pursuant** to A.R.S. § 28-692(B). We hold that the state presented such evidence. *Cannon* is distinguishable on this point. In *Cannon,* the state's expert was unable to perform a retrograde analysis and conceded that she could not rebut defendant's affirmative defense. 192 Ariz. at 239, 963 P.2d at 318. Here, however, the state's toxicologist did not concede that a retrograde analysis could not be performed. Further, there was ample evidence here from which the jury could reasonably determine that defendant's BAC was 0.10 or more at the time of driving.

> In *State ex rel. McDougall v. Superior Court*, 178 Ariz. 544, 546, 875 P.2d 203, 205 (App.1994), we held that whether a defendant's BAC at the time of driving was 0.10 or more is a question for the jury. In *McDougall*, the fact that a breathalyzer device registered the defendant's BAC at 0.10 or above did not conclusively establish that the defendant was driving at such a level. *Id*. The jury heard evidence indicating an inherent margin of error with the testing device, and "it was up to the jury to make the inference whether the test result combined with the other evidence showed intoxication at the time of the arrest." *Id*. The inherent margin of error was only one piece of evidence presented to overcome the statutory presumption of impairment in A.R.S. § 28-692(A)(2). *See id.* Other evidence indicated "that [d]efendant weaved three times, had a moderate odor of alcohol on his breath, had bloodshot and watery eyes, had slightly slurred speech, walked with a slight sway, and clenched his fist at the officer when arrested." *Id.*
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> Likewise, in this case, Flaxmayer's conclusion regarding defendant's BAC is not the only evidence the jury had to consider when determining whether he drove with a BAC of 0.10 or greater. The jury heard Officer Velten's testimony that defendant weaved within the curb lane, drove in excess of the posted speed limit, almost collided with a barrier wall, failed to stop after the officer activated his emergency lights, stopped on the highway on-ramp, had bloodshot and watery eyes, smelled of alcohol, had slurred speech, admitted to drinking Miller Lite beer that evening, had difficulty exiting his vehicle, failed field sobriety tests, refused to perform the breath test properly, and had a BAC of 0.155 nearly two hours after he was stopped by police. Therefore, the jury had sufficient evidence from which to infer that defendant had a BAC of 0.10 or greater at the time of driving or being in actual physical control of his vehicle. [FN3] For this reason, defendant's attempt to use *State v. Gallow, 185 Ariz. 219, 914 P.2d 1311 (App*.1995), to his advantage fails. There, Division Two found that the state did not show beyond a reasonable doubt that the defendant's BAC at the time of driving was 0.10 or above. *See id. at 221, 914 P.2d at 1313*. **However, unlike this case, in *Gallow*, there was no evidence from which the jury could infer the defendant's BAC**. *Id.*

Panveno, supra, 196 Ariz. at 335-36, 996 P.2d at 744-45. [emphasis added] Accordingly, the trial court did not err when it denied Appellant's motion for a directed verdict.

Now, therefore,

IT IS ORDERED affirming the judgment of the Mesa Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Mesa Municipal Court for all further appropriate proceedings.